IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.569 OF 1987

For Approval & Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether their lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

SHRI KESHAVPURI KANPURI GOSWAMI
VERSUS
THE DISTRICT DEVELOPMENT OFFICER

Appearance:
MRS. KA MEHTA for petitioner
None present for respondent

Coram: MR.JUSTICE S.K. Keshote,J
Date of decision: 14/09/2000

C.A.V. JUDGMENT

#. Heard the learned counsel for the petitioner.

#. It is not in dispute that the petitioner was convicted for offences u/s.409 and 477A of IPC for misappropriation of Government money amounting to Rs.10853.26 during his tenure as Talati-cum-Mantri, Mahi-Jada of Viramgam Taluka in Criminal Case No.275/1984 by the 4th Judicial First Class Magistrate at Narol. After recording his conviction under aforesaid provisions of IPC, the learned judicial magistrate extended benefits to the petitioner of Section 4 read with Section 12 of the Probation of Offenders' Act, 1958. As the petitioner was convicted for offences of moral turpitude, the disciplinary authority, District Development Officer, District Panchayat, Ahmedabad, after giving notice to the petitioner, has ordered for his dismissal from services. This order was challenged by petitioner by filing appeal before District Development Officer, and the appeal was also dismissed on 19th October 1985. The petitioner has taken up this matter before the Gujarat Civil Services Tribunal, Ahmedabad and his appeal also came to be rejected under the order dated 1.9.86. Hence this special civil application.

#. First contention raised by learned counsel for the petitioner is that the petitioner has been given benefit of section 4 read with section 12 of the Probation of Offenders' Act, 1958 and he could not have been dismissed from services as what it has been done in the present case. In her submission, full fledged departmental inquiry has to be held and when the misconduct is proved only then he could have been dismissed from services and not on the ground of conviction of his by the criminal court. The learned counsel for the petitioner very fairly submitted that this contention has been made by her only for the object so that if occasion arises to the petitioner for filing LPA, the LPA court may not say that this point has not been raised but on merits this point is covered by recent judgment delivered by Hon'ble Mr.Justice D.P.Buch. Next contention has been raised that it is only a case of temporary embezzlement of money of the Panchayat. The criminal court has also not sent the petitioner behind the bar and it was the first incident in his long service career. In these facts the penalty of dismissal is highly excessive and disproportionate to the guilt. Lastly, it is contended that the disciplinary authority has made a hostile discrimination in the matter of giving of penalty to the employees though they are identically situated. In support of this argument, necessary factual foundation has been made in paragraph 4(15) of the special civil application. It is stated that in the District

Panchayat, in several cases of temporary retention of Panchayat money by its employees, in most of those cases the Deputy District Development Officer has imposed penalty of stoppage of increments, reduction of pay to the lower grade etc. It is stated that there were five such cases of retention of Panchayat money by Talati-cum-Mantris and in all those cases the Deputy District Development Officer has imposed the penalty of reduction in pay or stoppage of increments etc. The copies of those orders are collectively submitted by petitioner as annexure-F to this special civil application. Concluding the submissions, the learned counsel for the petitioner submitted that when in the case of other Talati-cum-Mantris the penalties are imposed in a particular way and the petitioner could not have been treated unequally.

#. Reply to the special civil application has not been filed by respondents and the averments made by petitioner therein stand uncontroverted. When those averments are uncontroverted, naturally same are to be taken as if admitted by respondents. So far as legal position is concerned, whether reply is filed or not, it may not be material and equally where somebody has put appearance or not on behalf of respondents hardly matters for the court and that question has to be gone into and examined by this court without reply of the respondents as well as any representation of their by the advocate. But here the matter relates to the factual aspect and by filing reply to the special civil application, if those facts are not controverted, naturally the court may not have any option except to take those facts to be uncontroverted, i.e. admitted by respondents. It is not the case even where mere denial of the factual aspect as pleaded by petitioner has been made by respondents. The averments made by petitioner in the special civil application that five other Talati-cum-Mantris who have also been found guilty of retention/ misappropriation of money of the Panchayat for some period have been dealt with differently and in their cases only penalty of reduction in pay or withholding grade increments has been given whereas in the case of petitioner, this penalty of dismissal has been given, are not controverted. It is a question of fact and in the absence of reply to the same from the side of respondents, it is to be accepted that five other Talati-cum-Mantris were similarly situated and in the matter of awarding of penalty, the petitioner has been differently dealt with by the disciplinary authority, appellate authority and the Tribunal.

#. First I take the last contention raised by learned

counsel for the petitioner, re.: particular order passed by the authority in case of similarly situated person can be a ground for writ in favour of petitioner. For illegal / unwarranted orders passed by the authority, the court cannot compel the authority to repeat that illegality again and again. Such orders of the authorities are difficult to accept as a precedent. Here reference may have to the decision of the apex court in the case of Chandigarh Administration v. Jagjit Singh reported in AIR 1995 SC 705. In para-8, their Lordships of Supreme Court held:

"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such

> illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the Court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course barring exceptional situations would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises.)"

#. However, in this case those persons who were alleged to be differently dealt with in the similar matter by respondents are not party before this court in these proceedings. In the absence of those persons, it is not in the fitness of things, fair play and natural justice, to record any finding, re.: legality of those orders. But those orders also cannot be taken to be legal and

valid without going on the merits thereof to bestow all the benefit of those orders to the petitioner. The Hon'ble Supreme Court has, in the case aforesaid, said that each case must be decided on its own merits, factual and legal in accordance with legal principles. Reference here may have further to another decision of the apex court in the case of State of Bihar and ors. v. Kameshwar Prasad and anr.. reported in 2000 AIR SCW 2389. In para-30 and 31, their Lordships, Supreme Court held:

"30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in Gursharan Singh v. NDMC, (1996) 2 SCC 459: (1996 AIR SCW 749: AIR 1996 SC 1175) held that citizen have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed (para 9):

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

Again in Secretary, Jaipur Development Authority,

Jaipur v. Daulat Mal Jain, (1997) 1 SCC 35 this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding:

> "Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat of perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

In State of Haryana v. Ram Kumar Mann, (1997) 3 SCC 321 : (1997 AIR SCW 1574) this Court observed (para 3):

> "The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for

> enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."
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> 31. In view of our finding that the judgment of the High Court in the case of Brij Bihari Prasad Singh being contrary to law was not sustainable and liable to be dismissed, the impugned judgment in the case of Kameshwar Prasad Singh's case cannot be upheld. The aforesaid respondent is, therefore, not entitled to any relief as prayed for by him on the analogy of the judgments passed and directions given in Brij Bihari Prasad Singh's case."

#. The misconduct alleged against the petitioner is very grave and serious and on proof of which, rightly, major penalty is to be imposed and that is what it has been done in this case. In the facts of this case, this penalty cannot be said to be excessive or disproportionate or shocking to the conscience of the court and even if in some other case some lesser punishment is given, this benefit cannot be extended to the petitioner. So this contention raised by learned counsel for the petitioner is devoid of any substance and merits.

#. So far as other contention is concerned, it is also devoid of any substance and merits. The petitioner has admitted misappropriation of money of the Panchayat. He further admitted that he misappropriated Rs.700/- on 23.9.79 and Rs.1,465=20 from 14.9.80 to 18.11.80. He credited amount of Rs.7,000/- only after complaint was lodged with police. The amount has been deposited with the Panchayat but by this act of the petitioner, it cannot be taken to be a case where he can be given clean-chit or exoneration in the matter. The amount has been deposited by petitioner when it is found to be misappropriated by him. In such matters, the amounts are deposited by delinquent so that possibly a lenient view may be taken by the authorities. Otherwise also, when a case of misappropriation or embezzlement of money of District Panchayat is detected, the officers also make all the attempts to see that the delinquent/ offender first deposits this amount in the treasury. The amount

of Rs.10,853=26 was kept by petitioner with him for the period from 23rd August, 1989 to 18th December, 1989. In case it would not have been detected then it would have been ultimately a total loss to the Government. Otherwise also, this retention of Government money for about four months cannot be taken lightly and it is a clear case of misappropriation of Government money. In the matter what penalty is to be given to the delinquent on proof of charge, is absolutely a matter for consideration by the disciplinary authority or appellate authority. In such matters, the civil services Tribunal may not have also that much of wide power to substitute its own penalty for the penalty which has been imposed by the disciplinary authority and the appellate authority. So far as this court is concerned, it is no more now res-integra that it has very very limited power of judicial review in the matter of quantum of penalty to be given to the delinquent. Only in case where the court after considering all the aspects of the matter reaches to the conclusion that the penalty given to the delinquent is shocking to its judicial conscience, then only in that matter, the court may interfere but still it will not substitute its own penalty for the penalty given to the delinquent. In such matter, this court may remit the matter on this point for consideration of disciplinary authority or appellate authority. The penalty given to the petitioner in this case cannot be said to be shocking to the judicial conscience of this court. As to what this court has power of judicial review in such matter, I cannot do better than to here make a reference to the decision of the apex court in the case of B.C.Chaturvedi v. Union of India reported in JT 1995(8) SC 65. In paragraphs 22 & 23, the apex court held:

> "22. The aforesaid has, therefore, to be avoided and I have no doubt that a High Court would be within its jurisdiction to modify the punishment/ penalty by moulding the relief, which power it undoubtedly has, in view of long line of decisions of this Court, to which reference is not deemed necessary, as the position is well settled in law. It may, however, be stated that this power of moulding relief in cases of the present nature can be invoked by a High Court only when the punishment/ penalty awarded shocks the judicial conscience.
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> 23. It deserves to be pointed out that the

> mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh's case, AIR 1963 SC 1909, that the High Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. Of course, this power is not as wide which this Court has under Article 142. That, however, is a different matter.

#. It is also well settled that where there are charges of misappropriation or embezzlement of public money by the delinquent, on proof of the same, minimum penalty should have been of dismissal or removal of his from the services. In this case, the charge of misappropriation of Panchayat money has been proved against the petitioner and in such case, only appropriate penalty would have been of his dismissal or removal from the service.

##. Otherwise also, no interference of this court is called for in the order of the disciplinary authority which has been confirmed by the appellate authority and Tribunal of dismissal of the petitioner from the services of Panchayat for this misappropriation of Panchayat's money by him.

#. In the result, this special civil application fails and the same is dismissed. Rule discharged. No order as to costs.

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(sunil)